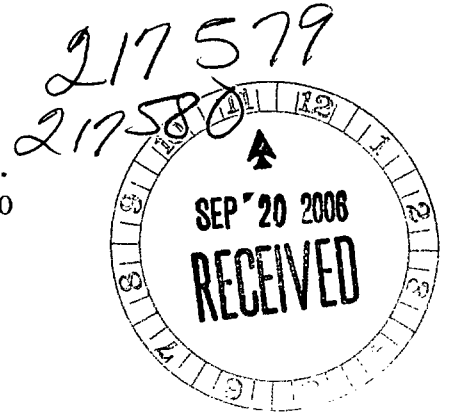


LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LA SALLE STREET - SUITE 1890
CHICAGO, ILLINOIS 60604-1112
TELEPHONE (312) 236-0204
FAX (312) 201-9695
mcfarland@aol.com



THOMAS F. MCFARLAND

September 19, 2006

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Office of Proceedings
ENTERED
SEP 19 2006
Part of
Public Record

Re: Finance Docket No. 34890, *PYCO Industries, Inc. -- Feeder Line Application --
Lines of South Plains Switching, Ltd. Co.*

Finance Docket No. 34922, *Keokuk Junction Railway Co. -- Feeder Line
Application -- Lines of South Plains Switching, Ltd. Co.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To BNSF's
Petition For Leave To Intervene, for filing with the Board in the above referenced matters.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for South Plains
Switching, Ltd. Co.

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cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD



PYCO INDUSTRIES, INC. -- FEEDER)	
LINE APPLICATION -- LINES OF)	FINANCE DOCKET
SOUTH PLAINS SWITCHING, LTD. CO.)	NO. 34890
)	
KEOKUK JUNCTION RAILWAY CO. --)	
FEEDER LINE APPLICATION -- LINES)	FINANCE DOCKET
OF SOUTH PLAINS SWITCHING, LTD.)	NO. 34922
CO.)	

**REPLY IN OPPOSITION TO BNSF'S
PETITION FOR LEAVE TO INTERVENE**

ENTERED
Office of Proceedings
SEP 20 2006
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Public Record

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Respondent

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Respondent

DATE FILED: September 20, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

PYCO INDUSTRIES, INC. -- FEEDER)	
LINE APPLICATION -- LINES OF)	FINANCE DOCKET
SOUTH PLAINS SWITCHING, LTD. CO.)	NO. 34890
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KEOKUK JUNCTION RAILWAY CO. --)	
FEEDER LINE APPLICATION -- LINES)	FINANCE DOCKET
OF SOUTH PLAINS SWITCHING, LTD.)	NO. 34922
CO.)	

**REPLY IN OPPOSITION TO BNSF'S
PETITION FOR LEAVE TO INTERVENE**

Pursuant to 49 C.F.R. § 1104.13(a), SOUTH PLAINS SWITCHING, LTD. CO. (SAW), who is Respondent in the above feeder line proceedings, hereby replies in opposition to a Petition for Leave to Intervene (Petition) filed by BNSF Railway Company (BNSF) on August 31, 2006.

SAW opposes intervention by BNSF on the ground that the Board does not have authority to take the actions that BNSF would request if BNSF were permitted to intervene.

**I. THE BOARD DOES NOT HAVE AUTHORITY TO APPLY BNSF'S
CONTRACTUAL RIGHT OF FIRST REFUSAL TO SALE OF SAW'S RAIL
LINES UNDER THE FEEDER STATUTE**

SAW agrees wholeheartedly with Keokuk Junction Railway Company (KJRY) that application of BNSF's contractual right of first refusal to sale of SAW's rail lines under the feeder statute "is improper as it would negate the processes set forth in Section 10907". (KJRY Feeder Line Application, filed August 4, 2006, at 28).

BNSF has argued that KJRY's position in that respect is unsupported (Petition at 4), but it is easy to see that KJRY's position is in accord with the intent of the feeder line statute. KJRY has expended substantial effort, time and funds to prepare, file and process its feeder line application. KJRY's actions in that respect are in full accord with the feeder line statute and with the Board's implementing feeder line regulations.

BNSF has argued that it should be permitted to negate KJRY's compliance with the feeder line statute by snatching the rail line away for itself at the last minute under a contractual provision that has no relationship whatsoever to the feeder line statute. BNSF's position in that respect is not in accord with the intent of the feeder line statute. Moreover, BNSF's position is contrary to law.

BNSF has argued that the Board lacks authority to override BNSF's contractual right of first refusal by means of approval of a feeder line application. (Petition at 5). BNSF has it entirely backwards. The Board does not have authority to permit a feeder line acquisition to be overridden by an allegedly inconsistent contractual right. As between an Act of Congress and an inconsistent contractual provision, the statute is clearly superior.

There is nothing to the contrary in *Milford Bennington R. Co., Inc. -- Feeder Line Acq. -- Boston & Maine Corp.*, 1991 ICC LEXIS 250 (FD No. 31701, decided Oct. 16, 1991), cited by BNSF at page 5 of the Petition. On the contrary, that decision undermines BNSF's position. The ICC there found that a lease of a rail line does not constitute a bar to a feeder line application because the Agency has statutory authority to remove encumbrances to sale of a line under the feeder statute. (*Id.* at *9-10). To the extent that BNSF's contractual right of first refusal is

viewed as an encumbrance that would override a duly authorized sale under the feeder line statute, it is clear that the Board has statutory authority to remove such an encumbrance.

Overriding BNSF's contractual right of first refusal would not treat BNSF unfairly. BNSF has the right to file its own feeder line application to acquire SAW's rail lines by the October 5, 2006 due date for such a filing. (See Board decisions served August 16, 2006 and August 18, 2006). The availability of that remedy to BNSF is an additional reason for refusing to permit its contractual right of first refusal to frustrate the feeder line statute.

BNSF's arguments for application of its right of first refusal are as feeble as those of Boston & Maine Corp. in the *Milford-Bennington* case, *supra*. (1991 ICC LEXIS 250 at *9, note 10). Thus, it is clear that BNSF is incorrect in alleging that sale of a rail line under the feeder line statute "is undertaken pursuant to a sale agreement negotiated by (the incumbent rail carrier and the feeder line applicant chosen by the incumbent)" (Petition at 4). There is no such "agreement" or "negotiat(ion)". A sale under the feeder line statute unquestionably is a forced involuntary sale, notwithstanding that an incumbent carrier may select between feeder line purchasers.^{1/}

Thus, a forced sale under the feeder line statute clearly does not constitute a "subsequent agreement . . . to sell . . . the Rail Line" within the meaning of Section 7(b) of the Sale Agreement between SAW and BNSF, so as to trigger the right of first refusal under that Section of the Agreement. (Emphasis added). It is elementary that a forced sale under the feeder line statute is not an agreement to sell the line. That points up another overriding reason why the

^{1/} *Indiana Hi-Rail Corp. - Feeder Line Acq.*, 366 I.C.C. 42 (1981), cited at page 4 of the Petition, was decided under a prior feeder line statute.

Board does not have authority to apply BNSF's right of first refusal to a feeder line sale in this proceeding: any such application would require the Board to interpret and enforce Section 7 of the Sale Agreement, which is a private contract between SAW and BNSF. It is settled law that the Board does not have the authority to interpret and enforce private contracts. *See, e.g., Coal Trading Corp. v. B.O. Railroad Co., et al.*, 6 I.C.C.2d 361 (1990), where the ICC said (at 365):

... The interpretation of the term 'tariff' or other contractual provisions, and the effect on the contracts of contract terms applicable to the shipments at issue is a matter for the courts. The Commission has no jurisdiction to provide such interpretation or to determine the rights of the parties under these contracts. Accordingly, we cannot and do not render an opinion on the underlying terms in the five different kinds of contracts.

It follows from all of the foregoing that the Board does not have authority to condition approval of a feeder line application on application of an alleged contractual right of first refusal to acquire the rail line at issue.

II. THE BOARD DOES NOT HAVE AUTHORITY TO IMPOSE A CONDITION TO APPROVAL OF THE FEEDER LINE APPLICATIONS THAT WOULD PREVENT SAW FROM INTERCHANGING DIRECTLY WITH BNSF

In the event that SAW's rail lines were to be divided up between SAW and another rail carrier as proposed under Alternative Two, BNSF would seek an "operating protocol" to the effect that BNSF be required to directly interchange with only one of those two rail carriers. (Petition at 2).^{2/}

Based on SAW's experience during litigation with PYCO over alternative rail service, the rail carrier that would be selected by the Board to interchange directly with BNSF under a

^{2/} BNSF has not explicitly requested a condition restricting its obligation to interchange directly with only one of the two carriers that may divide up SAW, but that is the clear implication of BNSF's position. *See, especially, note 1 at page 2 of the Petition.*

Board-imposed operating protocol would not be SAW. Thus, under the Board-imposed protocol in the alternative service case, West Texas & Lubbock Railroad interchanges SAW's inbound traffic with BNSF at BNSF's Yard. SAW and its shippers have suffered a substantial decline in quality of service on inbound traffic as a result of SAW's inability to interchange that traffic directly with BNSF.

The Board does not have authority to impose a condition to approval of the feeder line applications that would prevent SAW from interchanging traffic with BNSF directly at BNSF's Lubbock Yard. SAW has trackage and trackage rights over BNSF trackage that would enable SAW to directly interchange with BNSF at BNSF's Lubbock Yard regardless of acquisition of other SAW trackage under Alternative Two. SAW has a statutory right under 49 U.S.C. § 10742 to use that trackage and trackage rights to interchange directly with BNSF at Lubbock Yard. It is provided in 49 U.S.C. § 10742, as follows:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another rail carrier or of a water carrier providing transportation subject to chapter 137.

Consistently with the requirements of that statute, BNSF cannot pick and choose who it will interchange with, and the Board cannot sanction BNSF's attempt to do so in this proceeding.

For the foregoing reasons, the Board does not have the authority to condition approval of the feeder line applications in this proceeding on an "operating protocol" that would preclude SAW from interchanging directly with BNSF at BNSF's South Lubbock Yard.

III. THE BOARD DOES NOT HAVE AUTHORITY TO CONDITION APPROVAL OF THE FEEDER LINE APPLICATIONS ON APPLICATION OF BNSF'S RIGHT OF FIRST REFUSAL TO ANY SUBSEQUENT SALE OF THE RAIL LINE

A subsequent sale of a rail line acquired under the feeder line statute is governed by 49

U.S.C. § 10907(h), which provides, as follows:

If a purchasing carrier under this section proposes to sell or abandon all or any portion of a purchased railroad line, such purchasing carrier shall offer the right of first refusal with respect to such line or portion thereof to the carrier which sold such line under this section. Such offer shall be made at a price equal to the sum of the price paid by such purchasing carrier to such selling carrier for such line or portion thereof and the fair market value (less deterioration) of any improvements made, as adjusted to reflect inflation.

Thus, there is a statutory right of first refusal in the former rail line owner in regard to any such subsequent sale or abandonment.

The condition that would be sought by BNSF -- that BNSF's contractual right of first refusal apply to any such subsequent sale -- would clearly negate the provisions of Section 10907(h). The Petition does not contain argument in purported justification for BNSF's position that its contractual right of first refusal trumps the statute that expressly provides for a right of first refusal in a different entity. There is no such justification. Where, as here, a statute and a contract provide contradictory provisions on the same subject matter, it is elementary that the statute is controlling.

The Board thus simply does not have authority to substitute BNSF's contractual right of first refusal for the statutory right of first refusal in Section 10907(h).

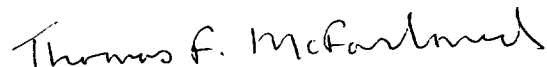
CONCLUSION AND REQUESTED RELIEF

Inasmuch as the Board does not have authority to grant any of the relief that BNSF would seek if it were permitted to intervene, BNSF's Petition for Leave to Intervene is required to be denied. SAW requests that the Petition be denied on that basis.

Respectfully submitted,

SOUTH PLAINS SWITCHING, LTD. CO.
P.O. Box 64299
Lubbock, TX 79464-4299

Respondent



THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Respondent

DATE FILED: September 20, 2006

CERTIFICATE OF SERVICE

I certify that on September 19, 2006, I served the foregoing document, Reply In Opposition To BNSF's Petition For Leave To Intervene, by UPS overnight mail, on the following:

Charles H. Montange, Esq.
426 N.W. 162nd Street
Seattle, WA 98177

Gary McLaren, Esq.
Phillips & McLaren
3305 66th Street, Suite 1A
Lubbock, TX 79413

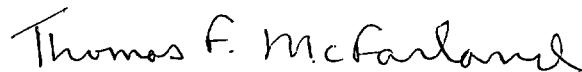
John D. Heffner, Esq.
John D. Heffner, PLLC
1920 N Street, N.W.
Suite 800
Washington, DC 20036

William A. Mullins, Esq.
Baker & Miller, PLLC
2401 Pennsylvania Avenue, N.W.
Suite 300
Washington, DC 20037

Daniel A. LaKemper, Esq.
Pioneer Industrial Railway Co.
1318 S. Johanson Rd.
Peoria, IL 61607

William C. Sippel, Esq.
Fletcher & Sippel, LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606-2875

Adrian L. Steel, Jr.
Mayer, Brown, Rowe & Maw, LLP
1909 K Street, N.W.
Washington, DC 20006-1101



Thomas F. McFarland